IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.521 of 2015

Arising Out of PS. Case No.-53 Year-2009 Thana- KHODAWANDPUR District- Begusarai

==========

Brahmdeo Sahni son of Laldhari Sahni resident of Village Bara P.S. Khodawanpur District- Begusarai.

... ... Appellant

Versus

The State of Bihar.

... ... Respondent

==========

with

CRIMINAL APPEAL (DB) No. 418 of 2015

Arising Out of PS. Case No.-53 Year-2009 Thana- KHODAWANDPUR District- Begusarai

==========

Parmanand Sah son of LAte Shri Sah, Resident of village- Bara, P.S Khodabandpur District- Begusarai.

... ... Appellant

Versus

The State Of Bihar

... ... Respondent

==========

Appearance :
(In CRIMINAL APPEAL (DB) No. 521 of 2015)
For the Appellant/s : Mr.Ashok Kumar
For the Respondent/s : Mr.Ajay Mishraapp
(In CRIMINAL APPEAL (DB) No. 418 of 2015)
For the Appellant/s : Mr.Jitendra Narain Sinha
For the Respondent/s : Mr.G.P.Jaiswalapp

==========

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 22-08-2023

Both these appeals are filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") against the common judgment of conviction and order of sentence dated 17.03.2015, passed by learned Additional District and Sessions Judge-7, Begusarai in Sessions Trial No. 1091 of 2009, arising out of Khodabandpur P.S. Case

No. 53 of 2009, whereby the concerned Trial Court has convicted both the appellants for the offences punishable under Section 302/34 of the Indian Penal Code. Appellant Parmanand Sah has further been convicted by the learned Trial Court for the offence punishable under Section 27 of the Arms Act.

Both the appellants have been sentenced to undergo life imprisonment for the offence punishable under Section 302 of the Indian Penal Code with a fine of Rs.10,000/- each. Appellant Parmanand Sah has further been sentenced to undergo R.I. for five years for the offence punishable under Section 27 of the Arms Act with a fine of Rs.10,000/- and in default of payment of fine, appellant Brahmdeo Sahni has to undergo R.I. for six months and appellant Parmanand Sah has to undergo R.I. for one year.

2. The prosecution story, in brief, is as under:

One Anita Devi, W/o Mahesh Sahu of village Bara, P.S. Khodawandpur, District Begusarai informed the concerned police authority that her husband had cultivated certain crops including ladies finger (*Bhindi*), maize, pumpkin (K*addu*), etc. on 12 katthas of land, which he had taken on lease from villager Ashwani Jha. It is also stated that adjacent to this land, land of one Brahmdeo Sahni [appellant of Cr. Appeal (DB) No. 521 of

2015] was situated and he had also cultivated the land. They used to go to sleep everyday after taking meal on their agricultural field. On the date of incident, it is alleged that at about 09:00 p.m., accused Brahmdeo Sahni came to the house of the first informant and asked her husband to accompany him so that they can sleep on the agricultural field of Brahmdeo Sahni. Thereafter, the husband of the first informant had gone along with accused Brahmdeo Sahni on their agricultural field. However, it was noticed by the first informant that her husband had forgotten the bedsheet and, therefore, she alongwith her daughter had proceeded towards the agricultural field of Brahmdeo Sahni. At that time, when she reached near Tetrahi road, she heard the sound of firing and thereafter she saw Parmanand Sahu [accused of Criminal Appeal (DB) No.418 of 2015] armed with pistol alongwith another co-accused Brahmdeo Sahni. One unknown person was also present and all these persons fled away from the spot. Thereafter the first informant saw that her husband had fallen down and he was in bleeding condition. Thereafter she found her husband dead. The first informant and her daughter Pinki Kumari both rushed to their village where the village people gathered and thereafter police was called and FIR came to be filed against the present

appellants and another. The said FIR was lodged at 10:45 p.m.

3. After registration of the FIR, the Investigating Officer carried out the investigation. During course of investigation, he recorded the statement of witnesses. The dead body of the deceased was sent for postmortem. Inquest *Panchnama* was also prepared before sending the dead body for postmortem. After investigation was over, the Investigating Officer filed charge-sheet against the accused before the concerned Magistrate Court. As the case was exclusively triable by Court of Sessions, the concerned Magistrate committed the same to the Sessions Court where the same was registered as Sessions Trial No.1091 of 2009.

4. During course of trial, the prosecution had examined five witnesses and also produced documentary evidence. After the evidence of the prosecution was over, further statement of the appellants-accused was recorded under Section 313 of the Code. The Trial Court after considering the documentary as well as oral evidence produced by the prosecution passed the impugned order of conviction as observed hereinabove. Both these appellants-convicts have, therefore, filed two different appeals.

5. As the learned counsel appearing on behalf of

appellant Brahmdeo Sahni (appellant of Criminal Appeal (DB) No.521 of 2015) was not available for his submission, we requested Ms. Surya Nilambari, Advocate to assist the Court and she was appointed as an *Amicus Curiae* in Criminal Appeal (DB) No.521 of 2015.

6. We have heard the arguments of Ms. Surya Nilambari, learned *Amicus Curiae* for the appellant Brahmdeo Sahni, Mr. Baxi S.R.P. Sinha, learned Senior Counsel assisted by Mr. Jitendra Narayan Sinha for the appellant Parmanand Sah, Mr. Satya Narayan Prasad, learned APP for the respondent-State as well as Mr. Vijay Anand, learned counsel appearing on behalf of the informant.

7. Learned Advocate appearing for the appellant Parmanand Sah as well as learned *Amicus Curiae* have mainly contended that though the prosecution has examined three witnesses, the said witnesses have admittedly not seen the incident in question, therefore, they are not eye witnesses to the incident. It is submitted that the case of the prosecution is based on circumstantial evidence and mainly it is the case of the prosecution that accused Brahmdeo was lastly seen in the company of the deceased when accused Brahmdeo came to the house of the first informant and husband of the first informant

and accused Brahmdeo together had gone to their agricultural field. It is submitted that though the first informant Anita Devi, wife of the deceased, had deposed that she had seen both the appellants alongwith one unknown person fleeing away from the place of occurrence and accused Parmanand Sahu was carrying pistol in his hand, it is difficult to believe the story put forward by the said witness as it was a dark night and, therefore, it was difficult for her and other two witnesses to identify the accused. Learned counsel for the parties further contended that there are major contractions between the information given by the first informant in the FIR as well as in her deposition given before the Trial Court. It is further submitted that the prosecution has failed to prove the motive on the part of the accused to commit the crime in question. It is contended that the first informant has specifically stated in the FIR that there was land dispute between deceased and accused Parmanand Sahu. However, during cross-examination of the said witness, she has specifically stated in paragraph-3 that partition of the land in question had taken place before 20 years and no dispute was pending in any court between the parties. Even otherwise, it is submitted by learned counsel that there was no enmity between deceased and accused Brahmdeo Sahni. Learned Advocate has

referred paragraph-13 of the cross-examination of the said witness in support of the said contention. Lastly, learned counsel appearing for the appellants have contended that incriminating circumstances were not put to the accused that they were seen fleeing away from the place of occurrence while recording statement under Section 313 of the Code. Learned counsel have referred the statement of the accused which was recorded under Section 313 of the Code.

8. It is also pointed out that the prosecution has failed to prove how does accused Brahmdeo facilitated accused Parmanand to kill the deceased and thereby he was sharing the common intention to kill the deceased. Learned counsel, therefore, urged that when the prosecution has failed to prove the case against applicants-accused beyond reasonable doubt, the Trial Court ought to have acquitted them.

9. Learned counsel for the appellants have placed reliance upon the decision rendered by the Hon'ble Supreme Court in the case of ***Raj Kumar @ Suman Vs. State (NCT of Delhi)***, rendered on 11.05.2023 in ***Cr. Appeal No. 1471 of 2023, arising out of S.L.P. (Cri.) No.11256 of 2018***. Learned *Amicus Curiae* has referred and placed reliance on paragraph nos. 11 and 16 of the said decision. Thereafter, learned counsel has

placed reliance upon the decision rendered by the Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra***, reported in ***AIR 1984 SC 1622***. Learned counsel has more particularly referred and placed reliance on paragraph nos. 150 to 160 of the said decision. Learned advocates, therefore, requested that impugned order be quashed and set aside and both these appeals be allowed.

10. On the other hand, learned APP has opposed both these appeals. It is mainly contended that the accused Brahmdeo was lastly seen in company of the deceased when he came to the residence of the deceased at about 09:00 p.m. on the date of incident. Thereafter, all the three prosecution witnesses have seen both these appellants in company with one unknown person fleeing away from the place of occurrence. They have seen the accused in torch light and looking to the conduct of the appellants, who were present at the place of occurrence, the prosecution has proved their presence at the place and, therefore, the trial court has not committed any error while passing the order of conviction against convicts-accused. Learned APP has also referred the relevant provisions contained in Section 106 of the Evidence Act in support of his contention. Learned APP has also referred the deposition given by P.W.4,

the doctor, who had performed the postmortem of the deceased and also referred the deposition given by P.W.5, the Investigating Officer. It is submitted that when the prosecution has proved the case against appellants beyond reasonable doubt, no error has been committed by the learned Trial Court while passing the order of conviction against the appellants. He, therefore, urged that both the appeals be dismissed.

11. We have considered the submissions canvassed by learned counsel appearing for the parties and *Amicus Curiae*. We also perused the entire evidence produced by the prosecution before the Trial Court. It would emerge from the record that P.W.3 Anita Devi has lodged the FIR in which she had given the name of both these appellants and one unknown person. During her deposition before the Court, P.W.3 has stated in her examination-in-chief that at about 09:00 p.m. when she was at her residence with her husband, her daughter Pinki Kumari and father-in-law Dorik Sao, accused Brahmdeo came to the residence and asked the husband of the informant to accompany him. At that time, the said witness asked Brahmdeo that her husband will not go with him as appellant Parmanand Sah will kill her husband. However, Brahmdeo Sahni insisted that the husband of the informant should accompany him.

Thereafter, both of them left the house of the informant and proceeded towards agricultural field of Brahmdeo Sahni. The informant thereafter noticed that her husband has forgotten to take bedsheet and, therefore, she along with her daughter went towards the agricultural field and when they reached near *Bara Tetrahi* road, she heard noise of firing and thereafter she saw that accused Parmanand Sah and Brahmdeo Sahni were fleeing away from the said place. She thereafter immediately went towards "*Bara Tetrahi Sadak*" and she found her husband in bleeding condition. She has also stated that she had seen pistol in the hand of Parmanand Sah. She further stated that Parmanand Sah was having dispute with regard to land with her husband as a result of which her husband was killed by the said accused with the help of other co-accused. During her cross-examination, the said witness has specifically admitted that father of accused Parmanand and her father-in-law are real brothers and there was a partition of land before 20 years. She has further admitted that accused, Brahmdeo Sahni was not having any enmity with the family of the first informant and no case is pending with regard to land between the deceased and the accused Parmanand Sah. The said witness has further stated in her cross-examination that the Investigating Officer had seen

the dead body of the deceased in torch light as well as in the moon light.

12. P.W.1, Dorik Sah is father-in-law of the first informant and father of the deceased. The said witness has also supported the case put forward by P.W.3, the first informant. Similarly P.W.2, Pinki Kumari, who is aged about 14 years, has also supported the version given by the P.W.3, the first informant.

13. P.W.4, Dr. Arun Kumar is the witness who had performed the postmortem of the deceased. The said witness has found following external injuries on the dead body of the deceased and thereafter gave his opinion with regard to cause of death.

> *"(i) Lacerated wound margin size 1½" x ½" going inside situated in left groin 1½" left to cubic symphysis with charring around the wound margin inverted wound of entry of projectile fire arm.*
>
> *On dissection skull brain matter Pale.*
>
> *Both lungs pale.*
>
> *Heart - both chambers empty.*
>
> *Abdomen – Liver - Pale.*
>
> *Spleen - Pale.*
>
> *Kidney – Pale.*
>
> *Abdominal Cavity - Full of blood and blood clots small and large intestine perforated and misentry. Misentry - lacerated food part materials present inside the peritoneal cavity. Urinary blood lacerated. Prostrate lacerated. One bullet found under neath the skin muscle at the left Let. 2 and 3 vertebra 4" left*

to vertebral column.

Time elapsed since death within six to 24 hours.

Cause of death- In my opinion the death is due to neurogenic and haemorrhagic shock as a result of above mentioned injuries caused by projectile fire arm."

From the aforesaid deposition given by the doctor, it can be said that the prosecution has proved that deceased died because of unnatural death and because of firearm injury sustained by him.

14. P.W.5, Surendra Kumar Mauar was Investigating Officer who had carried out the investigation after registration of the FIR. The FIR was recorded by him on the basis of the information given by Anita Devi, the first informant. During examination-in-chief, the said witness has stated that during course of investigation, he had recorded statement of village people including one Md. Arif, Raghuni Sahni, Kusheshwar Mahto, Hira Lal Thakur, Jagdish Mahto and Suraj Mahto. However, at this stage, it is pertinent to note that the prosecution has not examined all the aforesaid independent witnesses whose statement was recorded by the Investigating Officer. During cross-examination, the said witness has also admitted the fact that while giving the statement by witness Dorik Sao (P.W.1, father of the deceased) which was recorded under Section 161 of the Code, he has not stated that he was

having torch in his hand when he had gone to the place of incident. The said witness further stated that in the light of petromax and torch, he had prepared inquest *Panchnama*.

15. We have also verified the inquest report and the postmortem report of the deceased. We have also considered the further statement of the appellants-accused recorded under Section 313 of the Code. From the aforesaid evidence produced by the prosecution, it would emerge that there is no eye witness to the incident in question and at the most the case of the prosecution is based on circumstantial evidence and one of the circumstances pointed out by the prosecution during the course of the trial was that the deceased was lastly seen in company of appellant Brahmdeo Sahni when accused Brahmdeo Sahni came to the house of the first informant and called the deceased and both of them went to their agricultural field. Another circumstance, pointed out by the prosecution, on the basis of the evidence of the prosecution witness, is that, P.W.3, the first informant Anita Devi, wife of the deceased had seen both these appellants-accused fleeing away from the place of occurrence and immediately thereafter the dead body of the husband of the first informant was found at the place of occurrence and, therefore, it is argued by learned APP that looking to the

conduct of the appellants-accused and when they were found present at the place of incident, the prosecution has proved the case against the accused beyond reasonable doubt. At this stage, it is pertinent to note that it was a dark night and, therefore, it was difficult for the first informant to identify the accused. The prosecution witnesses though stated in their deposition that they have seen the incident in torch light which P.W.1, Dorik Sao was carrying in his hand. However, from the deposition given by the Investigating Officer, i.e., P.W.5, it is revealed that P.W.1, Dorik Sao, while giving statement before the police under Section 161 of the Code, has not stated about the said aspect.

16. We have gone through the deposition of P.W.1 to P.W.3, who are near relatives of the deceased and we are of the view that there are major contradictions, omissions and improvement in their deposition and, therefore, the story put forward by the prosecution is doubtful. Once again, it is to be noted that there is no eye witness to the incident in question and as contended by learned APP, the prosecution relies upon the theory of last seen together. At this stage, we would like to refer the decision rendered by the Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda*** *(supra)* wherein the Hon'ble Supreme Court has observed in paragraph 150 to 160 as under:

"150. It is well settled that the prosecution

must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this: where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court.

151. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh 1952 SCR 1091 : (AIR 1952 SC 343) . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail v. State of Uttar Pradesh, (1969) 3 SCC 198 and Ramgopal v. State of Maharashtra, AIR 1972 SC 656. It may be useful to extract what Mahajan, J. has laid down in Hanumant's case (at pp. 345-46 of AIR) (supra):

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as

not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the

accused.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

154. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in The King v. Horry, (1952) NZLR 111, thus:

"Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."

155. Lord Goddard slightly modified the expression 'morally certain' by 'such circumstances as render the commission of the crime certain'.

156. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry's case (supra) was approved by this Court in Anant Chintaman Lagu v. State of Bombay, (1960) 2 SCR 460 : (AIR 1960 SC 500). Lagu's case as also the principles enunciated by this Court in Hanumant's case (supra) have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases — Tufail case (1969) 3 SCC 198 (supra), Ramgopal's case (AIR 1972 SC 656) (supra), Chandrakant Nyalchand Seth v. State of Bombay (Criminal Appeal No 120 of 1957 decided on 19-2-1958), Dharambir Singh v.

State of Punjab (Criminal Appeal No 98 of 1958 decided on 4-11-1958). There are a number of other cases where although Hanumant's case has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration, (1974) 2 SCR 694 (696) : (AIR 1974 SC 691 at p. 693), Mohan Lal Pangasa v. State of U.P., AIR 1974 SC 1144 (1146), Shankarlal Gyarasilal Dixit v. State of Maharashtra, (1981) 2 SCR 384 (390) : (AIR 1981 SC 765 at p. 767) and M.G. Agarwal v. State of Maharashtra, (1963) 2 SCR 405 (419) : (AIR 1963 SC 200 at p. 206) a five-Judge Bench decision.

157. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in Deonandan Mishra v. State of Bihar, (1955) 2 SCR 570 (582) : (AIR 1955 SC 801 at p. 806), to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

"But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation. . . such absence of explanation or false explanation would itself be an additional link which completes the chain."

158. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of

what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

159. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal's case (AIR 1981 SC 765) (supra) where this Court observed thus:

"Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused."

160. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant's case (AIR 1952 SC 343) (supra). Unfortunately, however, the high Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the Court. When the prosecution is unable to prove any of the essential principles laid down in Hanumant's case, the High Court cannot supply the weakness or the lacuna

by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General.

17. From the aforesaid decision rendered by the Hon'ble Supreme Court, it can be said that in the case of circumstantial evidence, certain conditions must be fulfilled before the case against the appellants-accused based on circumstantial evidence can be said to be fully established. There must be chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused and none else. Various links in the chain of evidence led by the prosecution has to be satisfactorily proved.

18. At this stage, we would like to refer and rely upon the decision rendered by the Hon'ble Supreme Court in the case of **Anjan Kumar Sarma Vs. State of Assam**, reported in **(2017) 14 SCC 359** wherein the Hon'ble Supreme Court has observed in paragraphs 14, 17 and 23 as under:

"14. Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;

(2) the facts so established should be consistent only

with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (See *Sharad Birdhichand Sarda v. State of Maharashtra*, SCC p. 185, para 153; *M.G. Agarwal v. State of Maharashtra*, AIR SC para 18.)

xxx xxx xxx

17. It is settled law that inferences drawn by the court have to be on the basis of established facts and not on conjectures. (See *Sujit Biswas* v. *State of Assam* [*Sujit Biswas* v. *State of Assam*, (2013) 12 SCC 406 : (2014) 1 SCC (Cri) 677] , SCC paras 13-18.) The inference that was drawn by the High Court that the death was caused on 28-12-1992 within the time of 48 hours as mentioned in the post-mortem report is not correct. The post-mortem examination was conducted on 30-12-1992 at 12.00 noon and it was opined by PW 11 that the death occurred 24 to 48 hours prior to the time of post-mortem examination. Even if the time is stretched to the maximum of 48 hours, the death was after 12.00 noon on 28-12-1992. The deceased was in the company of the accused till 9.00 p.m. on 27-12-1992. The inference drawn by the High Court that the accused had killed the deceased on 28-12-1992 in the night-time and thrown the body on the railway track is not on the basis of any proved facts. The trial court is right in holding that there is no evidence on record to show that the deceased was with the accused after 12.00 noon on 28-12-1992.

xxx xxx xxx

23. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances

point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other judgments on this point that are cited by Mr Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in *State of Goa* v. *Sanjay Thakran* in support of his submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under: (SCC p. 776, para 34)

> "34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the

> intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case."

19. We would also like to refer and rely upon the decision rendered by the Hon'ble Supreme Court in the case of **Ravi Vs. State of Karnataka**, reported in **(2018) 16 SCC 102** wherein the Hon'ble Supreme Court has observed in paragraphs 3 and 5 as under:

> "3. The appellant-accused and the deceased along with Suma (PW 1) and Rama Nayak (PW 2) were together on 26-12-2004, the precise time being around 1.30 p.m. The dead body was recovered after a gap of four (4) days i.e. on 30-12-2004. The post-mortem report indicated that the death had occurred 30 hours prior to the time of post-mortem examination. The medical evidence, therefore, would be suggestive of the fact that the dead body was recovered after about two (2) days from 1.30 p.m. of 26-

12-2004.

5. “Last seen together” is certainly a strong piece of circumstantial evidence against an accused. However, as it has been held in numerous pronouncements of this Court, the time-lag between the occurrence of the death and when the accused was last seen in the company of the deceased has to be reasonably close to permit an inference of guilt to be drawn. When the time-lag is considerably large, as in the present case, it would be safer for the court to look for corroboration. In the present case, no corroboration is forthcoming. In the absence of any other circumstances which could connect the appellant-accused with the crime alleged except as indicated above and in the absence of any corroboration of the circumstance of “last seen together” we are of the view that a reasonable doubt can be entertained with regard to the involvement of the appellant-accused in the crime alleged against them. The burden under Section 106 of the Evidence Act, 1872 would not shift in the aforesaid fact situation, a position which has been dealt with by this Court in *Malleshappa* v. *State of Karnataka* [*Malleshappa* v. *State of Karnataka*, (2007) 13 SCC 399 : (2009) 2 SCC (Cri) 394] wherein the earlier view of this Court in *Mohibur Rahman* v. *State of Assam* [*Mohibur Rahman* v. *State of Assam*, (2002) 6 SCC 715 : 2002 SCC (Cri) 1496] has been extracted. The said view in *Mohibur Rahman* [*Mohibur Rahman* v. *State of Assam*, (2002) 6 SCC 715 : 2002 SCC (Cri) 1496] may be profitably extracted below: (*Malleshappa case* [*Malleshappa* v. *State of Karnataka*, (2007) 13 SCC 399 : (2009) 2 SCC (Cri) 394] , SCC p. 408, para 23)

> “*23*. … ‘*10*. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may

be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. In the present case there is no such proximity of time and place. As already noted the dead body has been recovered about 14 days after the date on which the deceased was last seen in the company of the accused. The distance between the two places is about 30-40 km. The event of the two accused persons having departed with the deceased and thus last seen together (by Lilima Rajbongshi, PW 6) does not bear such close proximity with the death of the victim by reference to time or place. According to Dr Ratan Ch. Das the death occurred 5 to 10 days before 9-2-1991. The medical evidence does not establish, and there is no other evidence available to hold, that the deceased had died on 24-1-1991 or soon thereafter. So far as the accused Mohibur Rahman is concerned this is the singular piece of circumstantial evidence available against him. We have already discussed the evidence as to recovery and held that he cannot be connected with any recovery. Merely because he was last seen with the deceased a few unascertainable number of days before his death, he cannot be held liable for the offence of having caused the death of the deceased. So far as the offence under Section 201 IPC is concerned there is no evidence worth the name available against him. He is entitled to an acquittal.' (*Mohibur Rahman* [*Mohibur Rahman* v. *State of Assam*, (2002) 6 SCC 715 : 2002 SCC (Cri) 1496] , SCC pp. 720-21, para 10)"

20. In the case of **Shailendra Rajdev Pasvan & Ors. Vs. State of Gujarat & Ors**, reported in **(2020) 14 SCC 750**, wherein the Hon'ble Supreme Court has observed in paragraph 17 as under:

"17. It is well settled by now that in a case based on

> circumstantial evidence the courts ought to have a conscientious approach and conviction ought to be recorded only in case all the links of the chain are complete pointing to the guilt of the accused. Each link unless connected together to form a chain may suggest suspicion but the same in itself cannot take place of proof and will not be sufficient to convict the accused."

21. Keeping in view the aforesaid decisions rendered by the Hon'ble Supreme Court, if the facts of the present case, as discussed hereinabove, are carefully examined, we are of the view that the prosecution has failed to prove the chain from which it can be established that the present appellants-accused only have committed the alleged offence and none else.

22. It is also pertinent to note that while recording further statement of the appellants-accused, the incriminating circumstances against the appellants-accused were not specifically put to them. Further statement of the appellants-accused recorded under Section 313 of the Code are produced at page 39-40 of the typed copy of paper book.

23. In the case of **Raj Kumar @ Suman** (supra), the Hon'ble Supreme Court has observed in paragraph 13 to 16 as under:

> ***"13.*** *Then we come to the decision of this Court in the case of* ***S. Harnam Singh v. State (Delhi Admn.).*** *In paragraph 22, this Court held thus :*
>
> ***"22.*** *Section 342 of the Code of Criminal*

Procedure, 1898, casts a duty on the court to put, at any enquiry or trial, questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. ***It follows as a necessary corollary therefrom that each material circumstance appearing in evidence against the accused is required to be put to him specifically, distinctly and separately. Failure to do so amounts to a serious irregularity vitiating the trial if it is shown to have prejudiced the accused. If the irregularity does not, in fact, occasion a failure of justice, it is curable under Section 537, of the Code."***

(emphasis added)

14. *Then we come to a decision in the case of* ***Samsul Haque*** *relied upon by the learned counsel for the appellant. In paragraphs 21 to 23, this Court held thus :*

*"**21.** The most vital aspect, in our view, and what drives the nail in the coffin in the case of the prosecution is the manner in which the court put the case to Accused 9, and the statement recorded under Section 313 CrPC. To say the least it is perfunctory.*

22. It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. *Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in Asraf Ali v. State of Assam [Asraf Ali v. State of Assam, (2008) 16 SCC 328 : (2010) 4 SCC (Cri) 278]. The relevant observations are in the following paragraphs : (SCC p. 334, paras 21-22)*

" 21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. ***The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it.*** *Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in S. Harnam Singh v. State (Delhi Admn.) [S. Harnam Singh v. State (Delhi Admn.), (1976) 2 SCC 819 : 1976 SCC (Cri) 324] while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facets by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."*

23. *While making the aforesaid observations, this*

Court also referred to its earlier judgment of the three-judge Bench in Shivaji Sahabrao Bobade v. State of Maharashtra [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033], which considered the fallout of the omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognised, that where there is a perfunctory examination under Section 313 CrPC, the matter is capable of being remitted to the trial court, with the direction to retry from the stage at which the prosecution was closed [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033].”

(emphasis added)

15. *Learned counsel for the respondent also relied upon a decision of this Court in the case of* ***Vahitha v. State of Tamil Nadu****. This case does not deal with the consequences of the omission made while questioning the accused under Section 313 of CrPC. This deals only with a contingency where evidence of the prosecution witnesses goes unchallenged. Now we come to the decision of this Court in the case of* ***Satyavir Singh*** *relied upon by the learned counsel for the respondent. The decision holds that the challenge to the conviction based on non-compliance with Section 313 of CrPC for the first time in the appeal cannot be entertained unless the accused demonstrates that prejudice has been caused to him. If an objection is raised at the earliest, the defect can be cured by recording an additional statement of the concerned accused. The sum*

and substance of the said decision is that such a long delay can be a factor in deciding whether the trial is vitiated. Moreover, what is binding is the decision of the larger Bench in the case of ***Shivaji Sahabrao Bobade****, which lays down that if there is prejudice caused to the accused resulting in failure of justice, the trial will vitiate.*

16. *The law consistently laid down by this Court can be summarized as under:*

(i) It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction;

(ii) The object of examination of the accused under Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence;

(iii) The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;

(iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;

(v) If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;

(vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and

(vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of CrPC.

(viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered."

24. At this stage, we would also like to refer and rely upon the decision rendered by the Hon'ble Supreme Court in the case of **Maheshwar Tigga Vs. State of Jharkhand**, reported in **(2020) 10 SCC 108**, wherein the Hon'ble Supreme Court has observed in paragraphs 7 and 8 as under:

"7. A bare perusal of the examination of the accused under Section 313 CrPC reveals it to be extremely casual and perfunctory in nature. Three capsuled questions only were asked to the appellant as follows which he denied:

"*Question 1*. There is a witness against you that when the informant V. Anshumala Tigga was going to school you were hiding near Tomra canal and after finding the informant in isolation you forced her to strip naked on knifepoint and raped her.

Question 2. After the rape when the informant ran to her home crying to inform her parents about the incident and when the parents of the informant came to you to inquire about the incident, you told them that "if I have committed rape then I will keep her as my wife".

Question 3. On your instruction, the informant's parents performed the "Lota Paani" ceremony of the informant, in which the informant as well as your parents were present, also in the said ceremony your parents had gifted the informant a saree and a blouse and the informant's parents had also gifted you some clothes."

> 8. It stands well settled that circumstances not put to an accused under Section 313 CrPC cannot be used against him, and must be excluded from consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt."

25. From the aforesaid decision rendered by the Hon'ble Supreme Court, it can be said that it is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctly and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction. The object of examination of the accused under Section 313 of the Code is to enable the accused to explain any circumstances appearing against them in the evidence. The failure to put material circumstances to the accused amounts to a serious irregularity and it will vitiate the trial if it is shown to have prejudiced the accused.

26. Keeping in view the aforesaid decision, once again, if the statement of the accused recorded under Section 313 of the Code is examined, we are of the view that the court has not put the incriminating circumstances to the accused as a result of which prejudice has been caused to the appellants-

accused as contended by learned counsel appearing for the appellant and *Amicus Curiae*.

27. At this stage, we would like to refer and rely upon the decision rendered by the Hon'ble Supreme Court in the case of **Reena Hazarika Vs. State of Assam**, reported in **(2019) 3 SCC 289**, wherein the Hon'ble Supreme Court has observed in paragraph 9 as under:

> "9. The essentials of circumstantial evidence stand well established by precedents and we do not consider it necessary to reiterate the same and burden the order unnecessarily. Suffice it to observe that in a case of circumstantial evidence the prosecution is required to establish the continuity in the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. Mere invocation of the last-seen theory, sans the facts and evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act, 1872 unless the prosecution first establishes a prima facie case. If the links in the chain of circumstances itself are not complete, and the prosecution is unable to establish a prima facie case, leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused, and the benefit of doubt will have to be given."

28. From the aforesaid decision, it can be said that if the prosecution is unable to establish a *prima facie* case leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused and the benefit of doubt will have to be given to the accused. Further, mere invocation of the last-seen theory, sans

the facts and the evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act unless the prosecution first establishes a *prima facie* case.

29. Keeping in view of the aforesaid decisions, if the facts of the present case are examined, we are of the view that the prosecution has wrongly placed reliance upon the provisions as contained in Section 106 of the Evidence Act.

30. We have re-appreciated the entire evidence produced by the prosecution and we are of the view that the prosecution has failed to prove the case against the appellants-accused-convicts beyond reasonable doubt and, therefore, the Trial Court has committed serious error while passing the order of conviction against both these appellants-accused.

31. Accordingly, both these appeals stand allowed. The impugned judgment of conviction and order of sentence dated 17.03.2015 passed by learned Additional District and Sessions Judge-7, Begusarai in connection with S.Tr. No.1091 of 2009 arising out of Khodabandpur P.S. Case No. 53 of 2009 is set aside. The appellants, namely, Brahmdeo Sahni in Criminal Appeal (DB) No.521 of 2015 and Parmanand Sah in Criminal Appeal (DB) No.418 of 2015 are acquitted of the charges levelled against them by the learned trial court. Since

appellant, namely, Parmanand Sah is on bail, he is discharged from the liabilities of his bail bond and appellant, namely, Brahmdeo Sahni is in jail, he is directed to be released forthwith, if his presence is not required in any other case.

32. At this stage, we would like to appreciate the assistance rendered by learned *Amicus Curiae*, namely, Ms. Surya Nilambari to this Court. We direct Patna High Court Legal Services Committee to pay Rs.5,000/- (Rupees Five Thousand) to learned *Amicus Curiae* for the assistance which she has rendered to us.

33. It is also made clear that if the appellants of both the appeals have deposited the amount of fine, the same shall be refunded to them.

(Vipul M. Pancholi, J.)

(Chandra Shekhar Jha, J.)

Sanjay/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	02.09.2023
Transmission Date	02.09.2023